

1420397 (Migration) [2015] AATA 3729 (26 November 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Nirmala Wakwella

CASE NUMBER: 1420397

DIBP REFERENCE(S): OSF2007/029161

MEMBER: Margie Bourke

DATE: 26 November 2015

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 26 November 2015 at 1:36pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 24 November 2014 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 16 March 2007 on the basis of his relationship with his sponsor. At that time, Class BC contained two subclasses: Subclass 100 (Spouse) and 110 (Interdependency). The applicant has made claims only for the Subclass 100 visa and does not claim to be in an interdependent relationship as required by Subclass 110.
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter, the primary criteria include cl.100.221.
4. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221 because the delegate was not satisfied that the applicant continued to be in a relationship with the sponsor at the time of decision, or that the applicant met the criteria of the other subclauses in cl.100.221.
5. The applicant appeared before the Tribunal on 26 November 2015 to give evidence and present arguments. The Tribunal also received oral evidence from a friend of the applicant.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant meets any of the requirements of cl.100.221 at the time of decision.

SPOUSE (cl.100.221(2)(b), (2A)(b))

8. **Whether the parties are in a 'spouse' relationship**
9. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, amongst other things, that at the time of this decision, the applicant is the spouse of the 'sponsoring spouse'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring spouse' is the person who was specified as the applicant's spouse or intended spouse in the related Subclass 309 application. In the present case the applicant claims to be the spouse of the sponsor who is a 'sponsoring spouse' within the meaning of that term.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

10. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a married relationship, but may meet the criteria on the basis of being in a de facto relationship as defined r.1.15A(2) of the Regulations. A person is in a de facto relationship with another person of the opposite sex, to whom they are not married, if they have a mutual commitment to a shared life to the

exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, they are of full age and they are not in a prohibited relationship.

11. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) which is attached to this decision.
12. The evidence in the Department file is that the parties intended to marry after the applicant received the permanent resident visa but had resided as de facto partners. The applicant referred to the sponsor as his partner at the time they had lived together.
13. The applicant told the Tribunal that the relationship between himself and the sponsor had ended in mid 2010. He stated that he continued to live in the same house that he had lived in at the time of application, but the sponsor had not lived in this house since she left in mid 2010. The Tribunal is satisfied based on the evidence of the applicant that at the time of decision the parties do not reside together, and do not share a household, do not have a commitment to a relationship together and do not represent themselves to other people as being in a de facto relationship with each other. The Tribunal is satisfied that the parties are not in a genuine and continuing relationship at the time of decision, and that they do not have a mutual commitment to a shared life to the exclusion of all others at the time of decision and that they do not live together, or not separately and apart, on a permanent basis at the time of decision. Based on the evidence of the applicant at the hearing the Tribunal is satisfied that at the time of decision the applicant and sponsor are not in a de facto or spousal relationship.
14. On the basis of the above the Tribunal is not satisfied that the requirements of r.1.15A(2)(a)-(c) are met at the time of decision.
15. Therefore, the applicant does not meet cl.100.221(2)(b) or (2A)(b).
16. The applicant told the Tribunal that at the time of decision the sponsor was not deceased. Therefore the applicant does not meet the requirements of cl.100.221(3). The applicant told the Tribunal he had not suffered domestic violence committed by the sponsoring spouse. The applicant also stated that there was no custody, joint custody, access to, residence orders, custody orders in respect of whom the sponsoring spouse has been granted joint custody or access by a court or has a residence order or contact order, nor is there an obligation under a child maintenance orders or other formal maintenance obligations. Based on the evidence of the applicant, the Tribunal is satisfied that the applicant does not meet the requirements of cl.100.221(4).
17. There is no evidence before the Tribunal that the matter has been remitted by the Tribunal for reconsideration, and the Minister had decided the applicant satisfies the criteria for the grant of a Subclass 100 visa apart from a criterion that the applicant held a Subclass 309 visa, or that the Tribunal has determined the applicant satisfies the criteria for the grant of a subclass 100 visa are part from the criterion that the applicant hold a Subclass 309 visa. Therefore the Tribunal is satisfied that the applicant does not meet the requirements of cl.100.221(4A).
18. As the Tribunal has found that the applicant does not meet the requirements of cl.100.221(2), (2A), (3), (4) or (4A), the Tribunal finds that the applicant does not meet the requirements of cl.100.221.
19. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

20.

DECISION

21. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

22.

23. Ministerial Intervention

24. The Tribunal considers this is an appropriate case to refer to the Minister for his consideration for the exercise of his powers pursuant to s.351 of the *Migration Act 1958*. The Tribunal considers the personal circumstances of the applicant who has been present in Australia since 2001, made the application for the partner visa in 2007 and at the time of decision has been in the same employment and lived at the same address for a period of over seven years.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

...

- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:
- (ad) a Partner (Migrant) (Class BC) visa; or
 - (ae) a Partner (Provisional) (Class UF) visa; or
 - (af) a Partner (Residence) (Class BS) visa; or
 - (ag) a Partner (Temporary) (Class UK) visa;
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.